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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 194.

C. V. BROWNE, PETITIONER,

vs.

UNION PACIFIC RAILROAD COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

ANSWER OF RESPONDENT TO BRIEF OF LUTHER M. WALTER, AMICUS CURIÆ.

N. H. LOOMIS,
T. M. LILLARD,
C. B. MATTHAI,
Attorneys for Respondent.

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Counsel seek to interpret the meaning of the word "description" by importing from the law relating to the sale of merchandise the doctrine announced in the cases of *Norrington v. Wright,* 115 U. S., 188, and *Cleveland Rolling Mill v. Rhodes,* 121 U. S., 255, which hold that in sales of merchandise where a time limit is fixed for the shipment, that time is of the essence of the contract, that it becomes a part of the description of the subject matter of what is sold,

and that upon a failure to ship within the time fixed the vendee may treat the contract as breached and refuse to accept the goods.

The contention is that under the Pomerene Act the date is a part of the description of the goods because when that act was passed time was the essence of the contract in a sale of merchandise which was to be shipped or delivered on a specified date, and that the subject matter of the contract was not properly identified without a statement of the time of shipment or delivery as agreed upon by the parties. Under this rule of law acceptance of the merchandise could be refused for failure to ship or deliver upon the specified dates as readily as though the wrong merchandise had been tendered. In other words, time having been made the essence of the contract by the agreement of the parties, it became a substantive attribute of the goods sold and there was not a completed sale which the purchaser was bound to recognize unless the goods were shipped or delivered within the time fixed.

We submit that this rule of law has never been and is not now applicable to the obligations of common carriers under bills of lading issued by them. Under the law pertaining to common carriers, goods must be transported and delivered within a reasonable time. If the carrier fails to transport and deliver within a reasonable time the remedy of the consignee is not to refuse to take the goods and sue for their value, but to accept them and sue for damages.

Hutchinson on Carriers, 3d Ed., Sec. 1372.
Scovill et al. v. Griffith, 12 N. Y., 509.
Chicago, etc. R. Co. v. Pfeifer, 90 Ark., 524.
Clark v. American Ex. Co., 106 N. W. (Ia.), 642.

Under the Interstate Commerce Act common carriers subject to that act are not permitted to contract for the carriage and delivery of merchandise within any specified time, unless the published tariff makes provision therefor and is open to all.

Chicago & Alton R. Co. v. Kirby, 225 U. S., 155, 164, 165.

A common carrier may not agree in advance to issue a bill of lading upon a day certain; it may do so only when the goods are delivered into its possession for carriage. When that has been done the duty of the carrier is to transport and deliver within a reasonable time.

The cases relied upon relate to agreements made by merchants free to make such contracts as their interests demand; not to contract with common carriers whose rights and duties are prescribed by laws which circumscribe their freedom of action.

The foregoing suggestions which point out some of the differences between the status of merchants and of common carriers indicate why the rule applicable to the sales of merchandise should not apply to the carriage and delivery of freight. If the rule contended for were adopted it would, among other things, constitute a warranty that the goods would be delivered on time; it would permit the consignee to refuse to accept freight not delivered within a reasonable time, and would reverse the rule which requires the consignee to accept the goods under such circumstances and sue for his damages.

In order to maintain the position that at the time of the passage of the Pomerene Act the description of the goods

was understood to include the date of the bill it must appear that this was the meaning of the term in accordance with the usage and practice of carriers. That it was not so understood must be apparent from the *Harold* case, 241 U. S., 371. Harold, as assignee, possessed all the rights of the original holder of the bill, and if the date of the bill had been part of the description of the goods, as held in the cases cited by counsel, the consignee would have been justified in refusing the shipment on that ground and his recovery of damages would not have been denied by this Court. In other words, the recovery in the *Harold* case would have been upheld if the doctrine contended for had been applicable to common carriers.

As a matter of fact, the argument is made in this case that one of the objects of the Pomerene Act was to make the doctrine contended for applicable to common carriers; and this argument is necessarily an admission that it did not so apply before the Pomerene Act was passed—in other words, that the date of the bill was not part of the description of the goods prior to the adoption of the Pomerene Act.

If the description of the goods was not understood to include the date of the bill at that time, how can it be said that Congress used those words with such meaning attached to them?

The Uniform Bill of Lading prescribed by the Interstate Commerce Commission clearly indicates what is included in the description of the goods and refutes the idea that the date is part of it. See form of bill attached to the decision of the Commission *In the Matter of Bills of Lading,* 55 I. C. C., 671, 740. Also *Domestic Bill of Lading and Live Stock Contracts,* 64 I. C. C., 357, Appendix D. At the top of the

bill is a place for the date. Farther down the page are the following headings:

No. packages.	Description of articles, special marks, and exceptions.	Weight.	Class or rate.	Check column.

Respectfully submitted,

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